1886

RAM KISHORE GANGOPADHYA v. BANDIKARATAN TEWARI CHOWDHRY.

The proper decree, upon the findings of the lower Appellate Court, would have been a decree for possession.

We accordingly modify the decree of the lower Appellate Court, and direct that a decree be made in favor of the plaintiff for possession of the property in dispute.

The plaintiff will recover wasilat under s. 211 of the Code of Civil Procedure from the date of the institution of the suit until delivery of possession or until the expiration of three years from this date, whichever event first occurs, with interest thereupon at six per cent. from date of ascertainment. The plaintiff will have his costs in all the Courts from the defendant.

K. M. C. *Decree modified.*

Before Mr. Justice Wilson and Mr. Justice Porter.

1886 *June* 9.

RAM NARAIN KOER AND OTHERS (DEFENDANTS) *v.* MAHABIR PERSHAD SINGH AND ANOTHER (PLAINTIFFS) AND THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (DEFENDANTS).

Public Demands Recovery Act (Beng. Act VII of 1880), *ss.* 10, 23—*Attachment under certificate procedure—"Estate," Meaning of—Act XI of* 1859, *ss.* 5, 6—*Notification of Sale, Specification of.*

The certificate and notice referred to in s. 10, Beng. Act VII of 1880, are executive acts, and an attachment, which is the result of those acts, is not a judicial, but an executive proceeding.

The meaning of s. 23 of that Act, which lays down that a Collector "in the discharge of his functions shall be deemed to be a person acting judicially within the meaning of Act XVIII of 1850," is, that for the purpose of protecting him from personal liability his action is to be regarded as judicial.

Under s. 6 of Act XI of 1859, it is not necessary that a notification should specify the owners of an estate or the owners of shares in the estate. *Secretary of State, &c.* v. *Rashbehary Mookerjee* (1) followed.

All that is necessary under that section is that the notification should specify the estate or shares in the estate to be sold, and in selling a share in an estate it is unnecessary to specify the shares or mouzahs of which that share is composed.

* Appeals from Original Decrees Nos. 358—360 of 1885, against the decrees of Baboo Matadin, Rai Bahadoor, Subordinate Judge of Chupra, dated the 25th of April 1885.

(1) I. L. R., 9 Calc., 591.

The word "estate," as there used, ordinarily means "mehal;" but the term also applies to a portion of a mehal with regard to which a separate account has been opened, but not to an undivided portion of a mehal as to which separate accounts are not kept.

THIS was a suit brought to set aside a sale of Mehal Roypatti, held for arrears of Government revenue, on the 6th January 1883, at which the mehal was purchased by the defendants Nos. 1 to 5.

The facts were that Mehal Roypatti consisted of two *kalams* under a *butwara* partition, the one bearing the Towzi No. 3142 consisting of eight *kalams*; in all of which the plaintiffs held a share, one of the other shareholders in these *kalams*, who held a share equal to the share of the plaintiffs, having opened a separate account with the Collector for payment of his share of the revenue; the remainder of the *pattis* being joint.

The other *kalam* of Mehal Roypatti, bearing the Towzi No. 3143, consisted of seventeen minor *kalams*, and in this both the plaintiffs and their co-sharers had opened separate accounts for payment of revenue.

On the 28th September 1882, which was the last day for payment of Government revenue, at the beginning of the day, the Government revenue in respect of Towzi No. 3142 was in arrear. On that day the plaintiffs paid in a sum in respect of Towzi No. 3142, which in amount, however, fell short of the arrear due.

On the same day there was also an arrear in respect of the plaintiffs' separate account in Towzi No. 3143, which at the beginning of the day amounted to Rs. 240. During that day the plaintiffs paid in Rs. 220; and at a later hour the same day paid in a further sum of Rs. 20. It appeared, however, that the plaintiffs' co-sharers had in respect of Towzi No. 3143 paid in more than their proper shares of revenue, so that, although there was a deficiency as regards the plaintiffs' separate account in Towzi No. 3143 without reckoning the Rs. 20 paid, still there would have been a credit balance in respect of the whole mehal.

As regards this part of the case the plaintiffs asserted that, on the 28th September 1882, there was no arrear due on account of the estate Towzi No. 3143, and that the Rs. 20 had been deposited on account of the arrears due for Towzi No. 3142.

1886

RAM NARAIN KOER v. MAHABIR PERSHAD SINGH.

They further alleged that the sale was held in an irregular manner; that the notifications under ss. 6 and 7 of Act XI of 1859 were not duly made, the shares in the estate not having been specified; that the correct name of the proprietor and the necessary particulars were not mentioned in the sale notification, the name of a person long since dead alone being mentioned; and that in consequence of these irregularities the sale was made at an inadequate price. Also that the Mehal sold was at the time of the sale under attachment for arrears of road cess, and that such an attachment was similar to and had the effect of an attachment by a Civil Court, and that a notice under s. 5 of Act XI of 1859 was necessary; that even if it were not so, the sale could not be held under s. 17 of Act XI of 1859. That the plaintiffs were minors at the date of the sale; that their estate was in the hands of the Court of Wards till July 1881; that the Collector gave up charge without making the estate over to their guardians; that it was not till February 1884 that their mother took out a certificate of guardianship and took over the management of the estate; that therefore the period to which the arrears related, and at which the sale was held, was one during which there was nobody on behalf of the minors managing the estate; that the Collector not having made over the estate to any body, the estate should be considered to have been under the charge of the Court of Wards.

The defendants Nos. 1 to 5 and the Secretary of State contended that the Rs. 20 was deposited on account of estate Towzi No. 3143, and denied all the other allegations made by the plaintiffs.

The Subordinate Judge found that the documents put in proved that the Rs. 20 was deposited on account of the estate Towzi No. 3143, and that there was an arrear due on account of Towzi No. 3142: that the notifications were duly served; but that the particulars required by s. 6 of Act XI of 1859 had not been complied with, inasmuch as no specification was given in the notification of the share belonging to the defaulter, or of the different *kalams* in the mehal, nor was the name of the recorded proprietor given; nor any statement made of the shares concerning which separate accounts had been opened as directed by s. 13 of Act XI of 1859.

1836

RAM NARAIN KOER v. MAHABIR PERSHAD SINGH.

He further found that the mehal sold was at the time under attachment for arrears of road cess, and held that such an attachment was similar to and had the effect of an attachment by a Civil Court, and was an act done by the Collector in a judicial capacity; that therefore a notice under s. 5 of Act XI was indispensable; and no notice having been given, the sale was illegal. That the estate of the plaintiffs after having been given up by the Court of Wards under s. 8 of Beng. Act IV of 1870, had immediately been taken charge of by their mother, who had collected the rents and had paid Government revenue.

He further held that the sale had been made at a very inadequate price, and that inasmuch as the sale had been made illegally, the inadequacy of the price was prejudicial to the plaintiffs.

He therefore set aside the sale.

The auction purchasers, defendants Nos. 1 to 5, appealed to the High Court.

Mr. *Evans*, Baboo *Unnoda Pershad Banerjee*, Baboo *Mohesh Chunder Chowdhry* and Mr. *C. Gregory* for the appellants.

Baboo *Hem Chunder Banerjee*, Moulvi *Mahomed Yusoof* and Baboo *Saligram Singh* for the respondents.

The judgment of the Court (WILSON and PORTER, JJ.) was as follows:—

The present suit is brought by the plaintiffs, who are the owners of a share of the property known as Mehal Roypatti, to set aside a sale for arrears of Government revenue which took place on the 6th of January 1883. A number of points have been raised which must be considered separately.

The point which it will be convenient to consider first is this: It is said that there was no authority to sell at all, because there was no arrear in the Government revenue. Of course, if that were so, the sale would be absolutely and totally void. The way it is sought to make out this point is this: There were two mehals, one numbered 3142, and the other 3143. The present plaintiffs were shareholders in each of those mehals. In mehal 3142, there were a number of other shareholders, one of whom had obtained from the Collector the

1886

RAM NARAIN KOER v. MAHABIR PERSHAD SINGH.

opening of a separate account of revenue in respect of his own share. In mehal 3143 there were also a number of shareholders, and no less than fifteen separate accounts of revenue had been opened in respect of the shares of the different shareholders. On the day fixed for the payment of arrears of Government revenue, before sunset, the 20th September 1882, at the beginning of the day, the Government revenue in respect of mehal 3142 was in arrear. A sum of money, but a sum short of the requisite amount, was paid by the present plaintiffs on that day, undoubtedly in respect of this mehal. There was also an arrear on that same day in respect of the present plaintiffs' separate account of revenue for mehal 3143; and that arrear at the beginning of that day amounted to Rs. 240. On that day they paid in Rs. 220 in one sum in respect of mehal 3143. On the same day they paid in another sum of Rs. 20. In all the documents relating to the transaction that sum of Rs. 20 appears as paid in respect of mehal 3143; but it also appears that the other shareholders had paid in more than their proper proportion of revenue. So without reckoning the Rs. 20 which were paid in on that day by the plaintiffs, although there would have been a deficiency on the present plaintiffs' separate account, there would not have been a deficiency, but a credit balance, in respect of the whole mehal. The plaintiffs say that they did not really pay those Rs. 20 in respect of mehal 3143, but that they paid that sum in respect of mehal 3142. That point the lower Court has found against them.

The Collectorate documents are clear on this point; and again it is quite clear that *that* sum of Rs. 20 was the precise sum, which, at the moment it was paid in, was necessary to clear off the arrear on the plaintiffs' separate account in respect of mehal 3143. These two circumstances afford very strong proof that it was in respect of mehal 3143, and not in respect of mehal 3142, that the plaintiffs paid the Rs. 20. We think therefore that the lower Court was quite right in rejecting the plaintiffs' evidence, that the Rs. 20 were really paid in respect of mehal 3142. It follows from that, that there was an arrear at sunset of that day in respect of mehal 3142. The first point therefore fails.

The next point relates to a contention based on s. 5 of the Revenue Sale Act (XI of 1859). Section 5 says that no estate, and no share or interest in an estate, shall be sold for the recovery of arrears otherwise than after a notification shall have been affixed in certain places for a period not less than fifteen clear days preceding the date fixed for payment, in certain cases: *first*, where the arrears are other than those of the current year, or of the year immediately preceding; *second*, where the arrears are due in respect of an estate other than the estate to be sold; *third*, where the arrears are those of an estate under attachment by order of any judicial authority, or managed by the Collector in accordance with such order.

It is said that in this case the sale proceedings were void, because the property, on the day fixed for payment and fifteen days before, was under attachment by order of a judicial authority.

It is not necessary for us to consider what the legal consequence would be if the case had fallen within s. 5, all the proceedings prescribed not having been taken. We think that the case does not fall within that section. It is said that the property was under attachment by order of a judicial authority because a certificate proceeding for the recovery of arrears of road cess had been taken, and a certificate had been made, and a notice as prescribed by s. 10, Beng. Act VII of 1880 had been issued and, as contended for by the plaintiffs, served.

We think that this contention fails for two reasons: *first*, the notice which is referred to does not amount to an attachment by order of a judicial authority. Bengal Act VII of 1880, which, by its terms, is incorporated with the two earlier Acts upon the like subject, provides for certificates in various cases. In s. 5 for a certificate of the balance left due after a revenue sale; in s. 7 for a certificate of debts due and payable to the Collector in a variety of cases; and in s. 9 for a certificate in cases of Government debts payable to persons other than the Collector, or in cases of debts due to managers on behalf of the Court of Wards. In each of these cases the certificate is given the effect of a decree for the purpose of execution. We then come to s. 10. That section says that, when a certificate in any of

1886

RAM NARAIN KOER v. MAHABIR PERSHAD SINGH.

the cases I have referred to "shall have been filed, the Collector shall issue to the judgment-debtor a copy of such certificate and a notice in Form 4 in the second schedule annexed to this Act;" and "from and after the service of such notice, such certificate shall bind all immoveable property of such judgment-debtor situate within the jurisdiction of such Collector in the same manner and with like effect as if such immoveable property had been attached under the provisions of s. 274 of the Civil Procedure Code." In other words, when once a certificate is filed, then notice is to issue. The notice is a notice informing the person concerned that a certificate has been filed; that if he denies his liability he must show cause why the certificate should not be executed; that if he does not show cause it will be executed; and it prohibits him from alienating his property. When that notice is served the certificate is to bind immoveable property to the same extent as if it were an attachment issued under s. 274 of the Code of Civil Procedure.

The certificate procedure in its very nature is clearly not a judicial procedure. There is no examining of the parties. There is no giving to any of them an opportunity to be heard. It is clearly an executive act, and that is what it is intended to be. The certificate and notice are clearly not judicial but executive acts. *Primâ facie*, therefore, the attachment, which is the result of those acts, is not a judicial but an executive proceeding. Then when we look at s. 23 we find that the Collector, in the discharge of his functions under Beng. Act VII of 1880, is to be "deemed to be a person acting judicially within the meaning of Act XVIII of 1850," that is, for the purpose of protecting him from personal liability his action is to be regarded as judicial. For these reasons we think that the attachment is not a judicial attachment.

In the next place, if it were a judicial attachment, it would be necessary for the present plaintiffs, who rely upon it, to show that at the time in question there was an actual valid attachment of this nature in force. This is not the case of a person who has in ignorance acquired a title upon which he might rely. It is the case of a defaulting party setting up his own default of payment of road cess and the proceedings taken

against his property in consequence. It is clear, therefore, that he is bound to show that everything was done regularly. What s. 10 directs is that a notice should be served, the contents of which I have described. The mode of serving the notice is prescribed by s. 5 of Beng. Act VII of 1868: "Every notice in and by this Act, or by the said Act XI of 1859, directed to be served, shall be served by delivering to the person to whom it may be directed, a copy thereof attested by the Collector, or by delivering such copy at the usual place of abode of such person, to some adult male member of his family, or, in case it cannot be so served, by posting such copy upon some conspicuous part of the usual or last known place of abode of such person." There was no attempt whatever to serve the notice issued under s. 10 in any of the ways contemplated by s. 5. It was treated as if it were an attachment by which the Collector was to take possession of the property. There was no personal service, and no attempt to serve sale notice at the dwelling place. There was simply a proclamation by the *peadah* of the terms of the notice, and a sticking up of the notice in a conspicuous place. Inasmuch therefore as the notice was not properly served there was no attachment.

The next objection is of a more serious character. It is said that the provisions of s. 6 of Act XI of 1859 have not been complied with, and further that on the authority of the recent Full Bench case of *Lala Mobaruk Lal* v. *The Secretary of State* (1) any defect in the notice under s. 6 is fatal to the whole of the sale proceedings.

It is not necessary for us to consider whether that Full Bench case does or does not go the full length of this contention, because it appears to us that there was no defect in the sale proclamation in this case. Two alleged defects are relied upon: *First*, it is said that the sale proclamation was faulty, because it mentioned as the registered owner a person long since dead and nobody else; and, *secondly*, that it did not sufficiently describe the share of the property to be sold. What it did do was this: It described the serial number. It stated correctly the towzi number. It stated correctly the name of the mehal, and the

(1) I. L. R., 11 Calc., 200.

1886

RAM NARAIN KOER v. MAHABIR PERSHAD SINGH.

pergunnah in which the mehal was situated. Then in the column, "name of proprietor mentioned in the sherista," it gave the name of Ghinu Singh. It may be taken that Ghinu Singh had been the registered proprietor, and that he had long since been dead. This was the ground of the objection founded on the name of the person in the sale proclamation, and it was sought to strengthen the objection by showing that, although the names of the present plaintiffs had not been entered in the register, yet an order had been passed for entering them in the register under the Land Registration Act of 1876. But the words of the section are plain. What is required is that the notice shall specify the estate or the shares in the estate to be sold. It is nowhere said that it is necessary to specify the owners of the estate, or the owners of the shares in the estate. And it has been held by this Court that *that* is the true view of the effect of the section. The point came before this Court in the case of the *Secretary of State* v. *Rashbehari Mukerjee* (1), and it was there held that the omission of the names of some of the recorded proprietors was not a fatal objection under s. 6, the reason being that what the law required was the specification of the estate to be sold, not the specification of the owners of the estate. That case applies to this. Then with regard to the second objection under s. 6, that is, that the estate or share in the estate sold was not sufficiently specified, it is necessary to look at the facts. The mehal in question bears the towzi number, as I have said, 3142. Its name is Mehal Roypatti. Its sudder jumma is Rs. 2,028 odd. One of the shareholders in the estate had before the period in question obtained from the Collector the opening of a separate account of revenue in his name, and the separate jumma assessed upon him in that separate account was Rs. 788 odd, leaving a balance of Rs. 1,240 odd, as the jumma of the non-*ijmali* portion. What the sale notification did was this. It stated correctly the towzi number and the name of the mehal. It cannot therefore be said that it did not specify the estate, because "estate" ordinarily means "mehal." The term "estate" does apply to a portion of a mehal with regard to which a separate account

(1) I. L. R., 9 Calc., 591.

is opened, but it does not apply to an undivided portion of a mehal as to which separate accounts are not kept.

Then it is said that the share in the estate is not specified. What is specified is this: The whole of the sudder jumma is specified. The jumma of the portion in respect of which a separate account was opened is specified, and the jumma of the *ijmali* portion is specified. *Primâ facie*, therefore, the sale notification does specify the share in the estate, because, where a separate account is opened under s. 10 of Act XI of 1859, it is only the jumma that has been separated. Therefore the estate is specified, and as to the thing which has been divided the division is specified But it is said that in this particular case the matter is different, that the division of the jumma does not show the shares in the estate, the shareholders not holding similar shares in all the mouzahs making up the estate. But does that affect the shares of the estate, that is, the shares of the mehal? We think it does not. "Estate" has been defined in Beng. Act VII of 1868. The words of s. 6 point throughout to estates and shares of estates, not to particular properties which make up estates. Then we must remember that the Collector, when he acts under ss. 10 and 11, may or may not know the shares in the mouzahs making up an estate. What is to be stated to him is the shares of the estate, and if the parties do not dispute the shares in that estate as they did not in this case, he assesses the revenue accordingly and opens separate accounts. But in such a case, the Collector has no reason for inquiring what the shares of the parties may be in the mouzahs, if the shares in the mouzahs be different from the shares in the estate. The authorities are to the same effect. In the case of *Amirunnessa Khātoon* v. *The Secretary of State* (1), heard before Garth, C.J., and Macpherson, J., it was held that it was unnecessary to specify in the notification of sale the names of the mouzahs included in the property sought to be sold. If in selling an estate it is unnecessary to specify the mouzahs of which that estate is made up, why should it be necessary, when selling a share in an estate, to specify the shares or mouzahs of which that share is made up?

(1) I. L. R., 10 Calc., 63.

1886

RAM NARAIN KOER v. MAHABIR PERSHAD SINGH.

The objection based on s. 6 therefore fails.

The next objection taken is under s. 5. It is said that the property being under attachment in the way that I have already described was not liable to be sold at all, because, *first*, it was under the management of the Court of Wards. On the evidence it appears to us perfectly clear, as it did to the Court below, that it was not under the management of the Court of Wards.

It is then said that it was not liable to be sold because it was held under attachment by the Revenue authorities by order of a judicial authority. But it is very clear that what that section points to is not an attachment in the sense in which the term is used in the Code of Civil Procedure, but an attachment such as is provided for in the Criminal Procedure Code, which takes the property out of the possession of the ordinary owner and places it into the possession of the Collector. The distinction is pointed out by the Privy Council in the case of *Bunwari Lall Sahu* v. *Mohabir Persad Singh* (1).

For these reasons we are unable to agree with the lower Court in the view which it took with regard to the effect in this case of s. 5 and of s. 6. We agree with the lower Court in all those points in which it decided against the contention of the plaintiffs.

The result is that in our judgment all the objections to the sale fail, that is to say, all the objections which a Court of law can give any effect to.

If, as suggested by the respondents' vakeel before us, this is a case of special hardship to the plaintiffs either from their being infants, or, for any other reason, the Courts of Law have not the power to interfere. If there be any power for such a contention, it is a matter for the consideration of the local Government.

The decision of the lower Court must be set aside, and the suit dismissed with costs in both Courts.

This judgment will govern the other two cases, namely, the appeals from Original Decrees Nos. 359 and 360 of 1885.

Appeal allowed.

T. A. P.

(1) 12 B. L. R., 297.